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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 197

NO. 72-1043

TOMMY LOVE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TENNESSEE

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1-10-73-50

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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 19....

NO. .....

TOMMY LOVE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TENNESSEE

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Criminal Court of Appeals of the State of Tennessee in this case, entered September 18, 1972, and made final by the order of the Supreme Court of the State of Tennessee in this case, denying petitioner's petition that a writ of certiorari issue, entered on November 8, 1972.

OPINION BELOW

The opinion of the Court below, filed September 18, 1972, has not been reported to date. The order of the Supreme

Court of the State of Tennessee, filed November 2, 1972, denying certiorari, was not accompanied by an opinion.

The order of the Criminal Court of Appeals of the State of Tennessee entered on September 18, 1972, and appended hereto, infra at page 14 was made final by the order of the Supreme Court of the State of Tennessee, denying petitioner's petition for a writ of certiorari entered on November 8, 1972, and appended hereto, infra at page 18.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1257(3).

QUESTIONS PRESENTED

1. Were petitioner's constitutional rights to a fair and impartial jury trial as per the Sixth Amendment of the United States Constitution violated by remarks made by the mother of the injured party within hearing distance of the jury during the course of the trial?

2. Can a person be convicted of aiding and abetting an assault with intent to commit voluntary manslaughter when the specific mens rea element required for an attempted homicide negates the substantive elements of manslaughter as defined by Tennessee law? (T.C.A. 39-603, 39-604.)

3. When the jury by its own independent admission in a criminal case is unable to reach a verdict twice and is then sent to deliberate a third time by the Court with instructions that the minority should have a disposition of being convinced by the majority, has the trial Judge coerced the verdict thus rendering it inoperative?

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The principal constitutional provisions involved are the Due Process and Equal Protection clauses of the fourteenth Amendment and the Impartial Jury clause of the Sixth Amendment. The pertinent Tennessee Code regulations are set forth below, in Appendix A.

STATEMENT OF THE CASE

Petitioner, Tommy Love, was arrested on March 9, 1970, and convicted on April 28, 1971, of aiding and abetting an assault with intent to commit voluntary manslaughter by a jury who set the sentence at three (3) years in the penitentiary.

Sometime in February, 1970, petitioned had contracted with the prosecuting witness, one Eddie Cole, to have petitioner's car repaired by Cole. At a later date petitioner sold the car (while it was still in the possession of Cole) to the co-defendant, James Russell.

On March 9, 1970, petitioner and Russell met at Cole's house, where the car was located, to consumate the sale and effect delivery of the car from petitioner to Russell.

A disagreement as to money owed for repairs on the car arose with Cole claiming he would not allow the car to be moved until he was paid, and petitioner claiming that no repairs were made and hence no money was owed. A violent argument broke out with threats coming from both petitioner and Cole. No overt acts, however, were made and the exchange to this point was verbal.

The testimony is in conflict as to the events following the argument. Relating these events in the light most favorable to the State, petitioner then told Russell that he

ought to shoot Cole if he did not surrender possession of the car. Russell had his own shotgun with him and after ten or fifteen more minutes of argument between petitioner and Cole and *verbal* encouragement from petitioner for Russell to shoot Cole, Russell did in fact shoot Cole in the lower part of Cole's leg.

Russell and petitioner both gave testimony that the shooting was in self defense as Cole was reaching in the trunk of the car for what Russell thought was a weapon, but since the testimony is a factual question and was apparently rejected by the jury, we do not raise the self defense issue on appeal.

Cole testified that after he was shot Russell left the scene and petitioner started kicking Cole in the face, shouting obscenities to him and commanding him to die, although petitioner walked with the aid of an artificial leg and demonstrated the impossibility of kicking.

During the course of the trial, Cole's mother was sitting adjacent to the jury box and was making audible remarks which were heard by the jury. When defense counsellor with his back to Mrs. Cole finally heard these remarks he raised an objection, and the Court ordered Mrs. Cole to be silent or absent herself from the proceedings.

The jury was twice unable to reach a verdict and after retiring a second time was instructed by the trial Court that they were to "arrive at a verdict, not a mistrial", and "the minority should listen to the views of the majority with the disposition of being convinced." (Bill of Ex. p. 162)

Petitioner then filed a motion for a new trial and the motion was overruled. On appeal the Tennessee Criminal Court of Appeals held: (1) that since no member of the Court knows what Mrs. Cole said and counsel did not move

for a mistrial at the time there was no prejudice of the jury; (2) that petitioner was properly convicted as an aider and abetter under T.C.A. 39-109; and (3) that there was nothing suggestive in the trial judge's secondary charge. (See Opinion, certified copy attached.)

ARGUMENT

I

PETITIONER'S CONSTITUTIONAL RIGHTS AS TO A FAIR AND IMPARTIAL JURY TRIAL AS PER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED BY REMARKS MADE BY THE MOTHER OF THE INJURED PARTY WITHIN HEARING DISTANCE OF THE JURY AND DURING THE COURSE OF THE TRIAL.

The Sixth Amendment of the United States Constitution guarantees every criminal defendant charged with a felony the right to an impartial jury trial. This amendment originally applied only to the Federal Government but has been incorporated to apply to the States. (*King v. State*, 432 S.W.2d 490; also 1 Tenn. Crim. App. 137).

Implicit in the meaning of the word "impartial" is the defendant's right to have the jury trying his case free from any improper influence. The jury should only be influenced in open court by those matters which the trial judge and officers of the Court have submitted to the jury in the way of instruction and evidence.

In the case at bar, the prosecuting witness' mother, Mrs. Cole, was seated adjacent to the jury box and closer to the jury than to the defense counsellor's table. Several remarks were made by Mrs. Cole during the course of the examination of all of the witnesses with the exception of the last three. When these remarks became audible, but not

yet coherent to defense counsel, an objection was raised and sustained and Mrs. Cole was ordered to remain silent, and she did so for the remainder of the trial.

Just what exactly Mrs. Cole said, no one knows with the exception of those jurors sitting at her end of the jury box. The sustaining of the objection, silencing Mrs. Cole, came too late to prevent her remarks from influencing members of the jury.

The Criminal Court of Appeals, agreeing with the State's position, ruled that since there was no evidence as to what Mrs. Cole said, there were no grounds for a new trial.

Petitioner strongly feels that the ruling of the Criminal Court of Appeals is a marked departure from the accepted and usual course of judicial proceedings.

The probability of safeguarding the citizen's constitutional right to an impartial jury is placed in extreme jeopardy if counselor for the defense is to be held to clearly hear side bar comments made by a spectator related to the prosecuting witness and directed only to the ears and minds of the jury.

To allow a defendant's constitutional rights to be predicated on the acuteness of his attorney's auditory system would certainly be anomalous.

Petitioner implores this Court to exercise its power of supervision over the Criminal Court of Appeals of the State of Tennessee and insure that the accused's constitutional right to an impartial jury is not jeopardized by the holding of the Court below.

II

A PERSON CANNOT BE CONVICTED OF AIDING AND ABETTING AN ASSAULT WITH INTENT TO COMMIT VOLUNTARY MANSLAUGHTER WHEN THE SPECIFIC MENS REA ELEMENT REQUIRED FOR AN ATTEMPTED HOMICIDE NEGATES THE SUBSTANTIVE ELEMENTS OF MANSLAUGHTER AS DEFINED BY TENNESSEE LAW.

Aiding and abetting an attempt to commit voluntary manslaughter is not a codified felony in and of itself. The wordiness of the "felony" is an indication of its difficulty of application. To reach a codification of this "felony" in the State of Tennessee, the State must draw from a combination of three separate sections of its Criminal Code, i.e. T.C.A. 39-109, 39-603, and 39-2409.

The logic of the existence of such an offense in its basic syllogism is as follows: First premise: Voluntary manslaughter is a felony. Second premise: An attempt to commit a felony is a felony; third premise, aiding and abetting a felony is a felony; conclusion: aiding and abetting an attempt to commit voluntary manslaughter is a felony. While the chain of logic in this syllogism seems unbreakable, like all too many conclusions of law, its simplicity is deceptive as to its validity.

The due process clause of the Fourteenth Amendment guarantees, among other things, that no state shall deprive any citizen of his liberty without due process of law. Due process of law requires that society and its citizens be put on notice as to what is and what is not a criminal offense. It is well recognized by petitioner that "ignornace of the law is no excuse" and petitioner does not wish the Court to overturn that legal maxim. However, mere words standing alone have never constituted an assault in the history of Anglo American Jurisprudence.

Petitioner here was convicted of aiding and abetting an assault with the evidence in the record of only mere words being used by petitioner "egging on" the co-defendant Russell. Russell had not only his own shotgun but his own mind and his own will in his possession. Russell pulled the trigger of the shotgun. It goes without saying that it requires but one person to operate the trigger mechanism of a shotgun. If one cannot commit assault by mere words, how then, can one aid and abet another to commit assault by mere words?

The evidence in the record of petitioner's verbal discourse with the co-defendant is insufficient to sustain petitioner's conviction of assault.

Petitioner also recognizes the further evidence in the record that petitioner kicked the prosecuting witness several times in the head after the shot was fired and co-defendant Russell had fled the scene. While the evidence of these acts was gathered by conflicting testimony, petitioner will assume, arguendo, that the jury believed this evidence as a true version of what happened.

Such acts on behalf of petitioner would certainly amount to an assault and battery. But to hold these acts as elements of an attempted homicide would be unreasonable and shock the conscience of the Court.

Petitioner was convicted for aiding and abetting co-defendant Russell's attempted homicide. The record shows that Russell had left the scene of the fracas before petitioner's alleged kicking commenced. Russell had obviously consummated his act and was not pursuing it any further. Petitioner's alleged kicking could not have been aiding and abetting Russell's attempt, at most; therefore, assault and battery would be the extent of petitioner's criminal liability.

The due process issue is thus raised by (1) the lack of codification of the specific felony; (2) the danger of a liberal statutory construction on the defendant's right to have notice of what is and what is not criminal; and (3) the seeming theoretical impossibility of committing the offense charged in the instant case due to the necessity that no specific intent or mens rea be found for a manslaughter conviction while the same specific intent or mens rea *must* be present for an attempt conviction.

In any case, the law is not clear as to whether the trial Court has the power to convict based on a felony of aiding and abetting an assault with intent to commit voluntary manslaughter, and petitioner would pray that this Court clarify the enforcement of such a felony.

III

WHEN THE JURY BY ITS OWN INDEPENDENT ADMISSION IN A CRIMINAL CASE IS UNABLE TO REACH A VERDICT TWICE AND IS THEN SENT TO DELIBERATE A THIRD TIME BY THE COURT, WITH INSTRUCTIONS THAT THE MINORITY SHOULD HAVE A DISPOSITION OF BEING CONVINCED BY THE MAJORITY, THE TRIAL JUDGE HAS COERCED THE VERDICT THUS RENDERING IT INOPERATIVE.

Petitioner recognizes the validity of the original "Allen charge" as expounded by this Court in 1896 (*Allen v. U. S.*, 164 U.S. 192). Petitioner would also urge this Court to consider the growing need at the present time in the Criminal Courts throughout the land to have their supplemental jury instructions clarified by this Court.

The modifications of the "Allen charge" given by trial judges for the past seventy-six years have been both voluminous and widely variant.

The most recent modification of the "Allen charge" was approved by the Illinois Supreme Court in *People v. Prim* on October 2, 1972, C. L. Rep. 2093 12. In that case, however, two important distinctions from the case at bar must be noted.

First, the foreman of the jury informed the trial judge that there was a chance of agreement being reached in the Illinois case. In the instant case, the jury simply told the judge twice that they were unable to agree. If the jury feels it can reach a verdict after more deliberation, the chance for judicial coercion is minimized; however, if a jury by its own independent statement is unable to agree as to a verdict, a supplemental instruction bordering a judicial mandate to agree approaches coercion of the verdict.

Second, the Prim case made no mention that the minority should listen to the majority with the "disposition of being convinced." Such a statement was made in the instant case.

Petitioner strongly feels that no minority member of a jury should ever be instructed to embrace the views of the majority in order to reach a verdict in lieu of a mistrial. Minority viewpoints should never be presumed as incorrect viewpoints; on the contrary, they should be indicative of a reasonable doubt as to the proof for the verdict. Tennessee still demands a unanimous verdict for a criminal conviction, and thus the failure of the minority to agree with the majority should not result in anything other than a mistrial.

Petitioner would respectfully cite to the Court the American Bar Association Project on Minimum Standards for Criminal Justice, Standards relating to the Function of the Trial Judges, Tentative Draft June, 1972, Sec. 5:12(b):

"In dealing with what appears to be a deadlocked jury, the Trial Judge should avoid instructions which imply that a majority view is the correct one ...."

We urge the Court to clarify the standards for the "Allen charge" as it should be used throughout the land, and we further implore the Court to eradicate from supplemental jury instructions the charge that the minority should listen to the majority with the disposition of being convinced.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted, and the judgment and order of the Criminal Court of Appeals of Tennessee in this case should be reversed.

Respectfully submitted,

THOMAS W. THOMSON,
908 Bank of Knoxville Building,
Knoxville, Tennessee,

Counsel for Petitioner.

APPENDIX A

UNITED STATES CONSTITUTION

AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT XIV, SEC. 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TENNESSEE CODE ANNOTATED

Sec. 39-109: "Aiders and abettors deemed principal offenders. ——All persons present, aiding or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

Sec. 39-603: "Assault with intent to commit felony-attempt to commit felony—Penalty.—If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500.00)."

Sec. 39-2409: Manslaughter.—"Manslaughter is the unlawful killing of another without notice, either express or implied, which may be either voluntary upon a sudden heat, or involuntary, but in the commission of same unlawful act."

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE KNOXVILLE, OCTOBER SESSION, 1971

TOMMY LOVE and
JAMES ARNOLD RUSSELL,

Plaintiff in Error

v.

STATE OF TENNESSEE,

Defendant in Error

NO. 155

KNOX CRIMINAL

Hon. Richard R. Ford, Judge

(Assault With Intent to Commit Voluntary Manslaughter)

(Filed September 18, 1972)

FOR PLAINTIFF IN ERROR:

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FOR DEFENDANT IN ERROR:

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Attorney General
Nashville, Tennessee

Robert H. Roberts
Assistant Attorney General
Nashville, Tennessee

John Gill
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Knox County Criminal
Court Building
Knoxville, Tennessee

Bill Petty
Special Prosecutor
City Law Director
Knoxville, Tennessee

AFFIRMED

[fol. 1] OPINION

Defendants were indicted for assault with intent to commit murder in the first degree and convicted of assault with intent to commit voluntary manslaughter with sentence fixed by the jury at three years in the Penitentiary. The trial court entered judgment of imprisonment for a period of not less than one year nor more than three years.

James Arnold Russell shot Eddie Cole with a shotgun. It is his contention that he fired in self-defense. Tommy Love contends that he was merely present and not involved in any fashion.

Three assignments of error are made (1) That the trial court erred in its application of the law as to Love being an aider and abettor; (2) It was error to allow the mother of Eddie Cole to be seated directly to and adjacent to the jury, talking in an audible voice during the examination of all but three witnesses; (3) The trial court imposed his own will and judgment upon the jury by his secondary instructions.

In reference to the first assignment, there is evidence in the record that Love precipitated the argument between the parties and that he brought the shotgun to Cole's residence, which was used by Russell to shoot Cole. That he urged Russell to shoot, and to kill the deceased, Cole; and after the shooting he also kicked Cole in the head a number of times while he was lying on the pavement. The defense offered several witnesses to refute and overcome this testimony.

It is apparent the jury believed the State's version of the evidence and under the circumstances of this case, Love was properly convicted in accordance with the pro-

[fol. 2] visions of T.C.A. Sec. 39-109 as a principal offender. T.C.A. Sec. 39-107 and 39-108 do not apply to the facts of this case as suggested by counsel since the defendant, Love, was present at the scene and actively participated, according to the evidence. The assignment must be overruled.

In regard to the second assignment, the record shows that during the course of the direct examination of defendant, Love, defense counsel expressed an objection to the Court about comments made by the mother of Eddie Cole within the hearing of the jury. There is no record of what she said, whether or not the jury heard any of her remarks, or anything else to indicate the remarks were prejudicial to the defendants. She was admonished by the Court about talking in the courtroom and apparently no further comments were made by her. No motion for mistrial was made at that time, and apparently counsel was aware of the woman's presence in the courtroom early in the trial when she was pointed out to him on his cross-examination of the prosecuting witness. We do not find any error on the part of the trial court or any prejudice to the defendants shown and the assignment is overruled.

Defendants charge error to the trial court in his instructions to the jury. After the jury retired to consider its verdict, they returned to the courtroom and informed the Court they were unable to reach a verdict. The Court further charged the jury with instructions which are included in the bill of exceptions and even under the authorities cited on behalf of the appellants, we find no error in the remarks made by the trial court. The jury was simply told that it was desirable they should agree if they could conscientiously do so. In *Frady v. State*, 67 Tenn. 349, our Supreme Court held that similar remarks were

not erroneous, and were not part of the charge. Here the trial court gave an additional charge which is included in the bill of exceptions. We do not find anything [fol. 3] improper or suggestive in the language used and the assignment is overruled.

Let the judgment of the trial court be affirmed.

/s/ CHARLES H. O'BRIEN
Charles H. O'Brien, Judge

CONCUR:

/s/ MARK A. WALKER
Mark A. Walker, Presiding Judge

/s/ W. WAYNE OLIVER
W. Wayne Oliver, Judge

CERTIFICATION

Office of CLERK OF COURT OF CRIMINAL APPEALS
For the Eastern Division of the State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Opinion of said Court, pronounced at its June term, 1972, in the case of Tommy Love and James Arnold Russell against State of Tennessee as appears of record now on file in my office

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 28th of December, 1972.

..... Clerk

(SEAL)

By ..... D. C.

APPENDIX C

SUPREME COURT OF TENNESSEE AT KNOXVILLE
SEPTEMBER TERM 1972

Filed Nov. 6, 1972
John A. Parker, Clerk

Tommy Love — Knox Criminal

v. — WRIT DENIED

State of Tennessee

This case coming on to be heard upon a transcript of the record from the Criminal Court of Knox County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner Tommy Love will pay the costs incident to filing petition for certiorari, for which let execution issue.

CERTIFICATION

Office of CLERK OF SUPREME COURT
For the Eastern Division of the State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Judgment Order of said court, pronounced at its September term, 1972, in the case of Tommy Love against State of Tennessee as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 28th day of December, 1972.

..... Clerk

(SEAL)

By ..... D. C.